THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0263, State of New Hampshire v. Carol A. Natoli, the court on December 7, 2007, issued the following order:

The defendant, Carol A. Natoli, appeals her conviction for driving while under the influence of intoxicating liquor, see RSA 265:82 (2004) (repealed 2006; current version at RSA 265-A:2 (Supp. 2006)), arguing that the trial court erred by finding that: (1) she was in actual physical control of the vehicle in which she was found; and (2) she drove the car on a "way" for purposes of RSA 259:125 (Supp. 2006).

On August 21, 2007, the court issued an order affirming the defendant's conviction. On September 26, 2007, the court granted the defendant's motion for reconsideration and assigned this case for argument before a 3JX panel. See Sup. Ct. R. 12-D. Having considered the parties' arguments, briefs and the appellate record, we affirm.

We first address whether the record was sufficient to establish that the defendant was in actual physical control of the car within the meaning of RSA 259:24 (Supp. 2006). To be in actual physical control of a car, the defendant must have the bodily capacity to guide or exercise dominion over the car at the present time. See State v. Winstead, 150 N.H. 244, 247 (2003). Even if the defendant was asleep when she was discovered, the State may establish this element through circumstantial evidence that, prior to falling asleep, the defendant started the car. See id. at 247-48. The weight of the circumstantial evidence is for the trier of fact to assess. See State v. Willard, 139 N.H. 568, 571 (1995).

The record in this case provides more than sufficient evidence to sustain the trial court's finding that the defendant was in actual physical control of the car when she fell asleep. At trial, the defendant stipulated that she was under the influence of intoxicating liquor and impaired at the time alleged and that she refused to submit to a chemical test. At the time the responding police officers found her, the defendant was impaired and asleep in the driver's seat, the engine was running and "very hot," and there was an odor of alcoholic beverages emanating from the car. Moreover, despite the initial report to the police that a "man" was asleep in the car, the reporting witness positively identified the defendant at trial as the person he had discovered, and there was no evidence from which one could rationally conclude that anyone other than the defendant had started the car. See Winstead, 150 N.H. at 247-48. Under

the circumstances, we conclude that the trial court could have found, beyond a reasonable doubt, that the defendant was in actual physical control of the car prior to falling asleep in an impaired condition.

We next address whether the parking area in which the defendant's car was discovered was a "way" within the meaning of RSA 259:125, II. "[W]e are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent." State v. Hammell, 147 N.H. 313, 322 (2001) (citation omitted). We construe statutory language within the context of the overall statutory scheme, bearing in mind the policy to be advanced by the statutory scheme. See Hull v. Town of Plymouth, 143 N.H. 381, 383 (1999).

RSA 259:125, II defines "way" for purposes of driving under the influence to include "any public highway, street, avenue, road, alley, park, parking lot or parkway; . . . any privately owned and maintained way open for public use; and any private parking lots, including parking lots and other out-of-door areas of commercial establishments which are generally maintained for the benefit of the public." The plain language of this definition unambiguously includes both public and private roads and parking areas in condominium complexes, so long as the private road or parking area is generally available for public use.

We conclude that both Brittany Way and the parking area in which the defendant was found fall squarely within the meaning of "way." Specifically, the evidence, including the trial court's observations of both Brittany Way and the parking area, the photograph of the parking area, and the testimony of Scott Heston, establishes the absence of any signs, personnel, gates, or other measures to prevent members of the general public from utilizing either Brittany Way or the parking area of 12 Brittany Way. This was sufficient to sustain the trial court's findings beyond a reasonable doubt that the defendant was upon a "way."

Because the record supports findings that the parking area of 12 Brittany Way was a "way" and that the defendant was in actual physical control of the car in an impaired condition prior to falling asleep, and because the car was found partially on the parking area, we conclude that the record was sufficient to sustain the defendant's conviction. In light of the parties' stipulation as to the content of Officer Rautenberg's cross-examination, we reject the defendant's argument that the failure to preserve this testimony warrants dismissal of her conviction. Cf. Fitzgerald v. Sargent, 117 N.H. 104, 105-06 (1977) (failure to record ten minutes not reversible where trial court was able to reconstruct the record and appellant was not prejudiced).

In deciding the issues raised by this appeal, we have not considered the photograph of the defendant appended to the State's brief. Accordingly, the State's motion to expand the record is moot.

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

Eileen Fox,
Clerk